Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements	)	WC Docket No. 02-112

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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SBC Communications Inc., on behalf of itself and its subsidiaries (collectively referred to as "SBC"), hereby respectfully submits its reply in opposition to CLEC comments on AT&T's Petition to Extend SBC's Section 272 Obligations.

I. INTRODUCTION AND SUMMARY

Ignoring the Commission's recent *Verizon New York* decision[1], CLECs join AT&T in requesting the Commission to extend SBC's section 272 obligations for another three years. Their arguments are not novel: these are the exact same arguments they made in the *Sunset NPRM* proceeding and that the Commission rightly ignored when it allowed Verizon's section 272 requirements to sunset. It should do the same here, and defer all broad policy issues to the rulemaking.

The extension of structural separation requirements beyond the period required by Congress is a drastic measure but, even if it were not, CLECs provide no justification for the Commission to take such an action. As Chairman Powell has stated:

> if we don't have a clear and demonstrable justification of a rule, then the appropriate role of government is to take the rule away or not interfere in the otherwise proper functioning of a market, rather than leave a rule in for good measure. Over history a lot of rules that were left for good measure … have secondary effects that often harm the welfare of consumers. … I don't think you've got to prove to me that a rule is not necessary. I think I have to prove

[1] FCC Public Notice, "Section 272 Sunsets for Verizon in New York State By Operation of Law on December 23, 2002, Pursuant to Section 272(f)(1)" (Dec. 23. 2002).

> that it is necessary. And if I can't do that, I don't think that I should intervene.[2]

These words are particularly apt in this proceeding. Although commenters serve up their usual dose of rhetoric, the reality is that none presents any compelling reason to postpone the sunset date established by Congress for structural separation. To the contrary, the only practical result of such an action would be to handicap the BOCs in the long-distance market, thereby distorting competition and denying consumers the benefits of an effectively functioning market. Indeed, that is precisely what those who propose extending these requirements have in mind. To avoid this result, SBC urges the Commission to allow the section 272 obligations to sunset as scheduled just as it did in *Verizon New York*.

II. CLEC'S HAVE NOT SHOWN THAT THE COMMISSION SHOULD IGNORE THE STATUTORY SUNSET PROVISION AND EXTEND THE SECTION 272 SEPARATE AFFILIATE REQUIREMENTS IN TEXAS.

Section 272(f)(1) states that "[t]he provisions of this Section [272] (other than subsection (e)) shall cease to apply with respect to the manufacturing activities or the interLATA telecommunications services of a Bell operating company 3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under § 271(d) of this title, unless the Commission extends such 3-year period by rule or order."[3] The BOCs' competitors, not surprisingly, urge the Commission to extend the three-year sunset date period so that the BOCs can compete less effectively in the long-distance market. They present no basis, however, for the Commission to trump the three-year sunset established in the Act.

A. CLEC's Have Not Distinguished The Verizon Decision.

As stated above, this Commission has already allowed Verizon's section 272 requirements to sunset in New York and it should follow the same course here. Like AT&T, the

[2] "Powell Defines Stance on Telecom Competition," COMMUNICATIONS DAILY, May 22, 2001 at 2-3.

[3] 47 U.S.C. § 272(f)(1).

other CLECs simply recycle the arguments they made in the *Sunset NPRM* and that the Commission ignored in Verizon's case. For example, WorldCom's primary argument here, as in the *Sunset NPRM*, is that because of its market power SBC (like Verizon) has the ability to discriminate against its competitors and, therefore, should be denied sunset until it is non-dominant in the local exchange market.[4] Sprint also objects to sunset on the grounds of local market dominance. Although Sprint agrees that the Commission rejected its argument in *Verizon New York*, it argues that this Commission should nevertheless deny SBC's sunset because SBC is "clearly dominant."[5] Further, like AT&T, it attempts to distinguish SBC by arguing that CLEC market shares in Texas are lower than New York. As SBC has explained in its comments, these attempts to distinguish Texas from New York are fatuous. The Commission's Verizon Order did not establish a market share test, much less a New York market share test.[6] CLEC arguments – which apply with equal force to Verizon and, indeed to all BOCs – should be summarily rejected while broader issues, like the classification of BOCs in the provision of local and long distance services, should be deferred to the rulemaking proceeding.[7]

B. Competitors' Arguments about SBC's Market Dominance are Misleading and Irrelevant.

SBC's competitors repeat AT&T's comments and argue that SBC's section 272 obligations should be extended because SBC is dominant in the local market and CLEC market

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[4] WorldCom Comments at 2.

[5] Sprint Comments at 6.

[6] Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953 (1999), aff'd sub nom., AT&T Corp. V. FCC, 220 F.3d 607 (D.C. Cir. 2000). SBC has briefed this issue in detail in its Comments and refers the Commission thereto. See, SBC Comments at 2-4.

[7] Just last week the Commission adopted a Further Notice of Proposed Rulemaking on the appropriate classification of BOCs after they integrate local and long distance operations. See, Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, WC Docket No. 02-112 and CC Docket No. 00-175, Further Notice of Proposed Rulemaking, FCC 03-111 (rel. May 19, 2003).

shares, particularly for facilities-based competition, are low.[8] Although this is the same argument that the Commission rejected in *Verizon New York*, Sprint, in particular, has taken a few quotes out of context and attempted to put together a dramatic SBC success story. If SBC were doing so fabulously well, its stock would not have plummeted from nearly $60 in a couple of years to nearly $20 today. On a more granular level, Sprint's claims about SBC's increasing market share in the long distance market are simply silly. As an initial matter, it should hardly come as a surprise that SBC is gaining market share in long-distance services; it entered the market with a *zero* percent share. By the same token, CLECs, including the major IXCs, are gaining market share in local services. Indeed, SBC estimates that over the past two years, CLEC market shares in its service area in Texas has increased by almost 30%.[9] Sprint's argument that separate affiliate requirements should be retained because of SBC's market share gains is thus silly.

Of course, even with its market share gains, SBC is far from "dominant" in the long-distance market. SBC's market share remains well below fifty percent, and its market share gains are largely attributable to relatively low-end residential consumers, as opposed to the more lucrative enterprise market that remains dominated by the big three IXCs.[10] But the larger point – one that SBC emphasized in its comments, and that the Commission embraced by refusing to

[8] Sprint Comments at 5; WorldCom Comments at 3.

[9] See SBC Comments at 5. Commenter's claims regarding the extent of facilities-based competition in Texas is understated. Even ignoring the lines served by UNE-P entry, SBC's estimates (based on a conservative E-911 methodology) show that as of the end of 2002 about 29% of the CLECs in its serving area were providing service, wholly or partially, over their own facilities. Moreover, it is noteworthy that CLECs ignore the extent of UNE-P competition in Texas given that they repeatedly distinguished UNE-P from resale, claiming that UNE-P permits them to add their own enhancements and features. Yet, when it suits them otherwise, they dismiss UNE-P competition as non facilities-based competition. In any event, the extent of facilities-based competition is irrelevant to the sunset of section 272 requirements.

[10] Sprint also makes reference to SBC's gains in the DSL market. It is a mystery why Sprint would even mention DSL services because even if the Commission reversed course and refused to allow section 272 requirements to sunset as provided by section 272(f), SBC still would not be required to provide DSL services through that affiliate. Moreover, Sprint's claim that SBC has a high market share in DSL services is almost laughable, given that virtually every analyst that studies the broadband market projects that cable modem services will maintain a wide lead over DSL services as far into the future as they dare to project.

delay the section 272 sunset in New York – is that allegations of market power, in and of themselves, do not demonstrate a need for separate affiliate requirements.[11]

Nor is the fact that some CLECs are going bankrupt a reason to protect them by saddling the BOCs with unnecessary and costly burdens. Indeed, one reason there have been so many bankruptcies is that, encouraged by Commission policies designed to "jump start" competition, a vast number of CLECs entered the market. Many lacked sound business plans and were attracted to the market precisely because of the advantage they were deriving from Commission regulations. The bankruptcies were, in many respects, inevitable. Far from demonstrating the need for regulatory intervention, these bankruptcies demonstrate the need for avoidance of too much government interference in the marketplace.

C. Commenters' Claims That Structural Safeguards Are Necessary To Prevent Discrimination Are Without Merit.

Like AT&T, WorldCom and other CLECs repeat their *Sunset NPRM* arguments that section 272 requirements should be extended because they are necessary to prevent discrimination. WorldCom argues that this Commission has a long history of imposing separate affiliate requirements on dominant LECs.[12] WorldCom has a selective memory. The fact is that for almost twenty years, this Commission has recognized that structural safeguards are an extreme remedy that must be used judiciously, and that non-structural safeguards are often just as effective to detect and deter discrimination. For example, in Computer III, the Commission determined that structural separation requirements impose substantial costs resulting from the duplication of facilities and personnel, limitations on joint marketing, deprivation of economies of scope, and increased transaction and production costs.[13] The Commission also concluded that

[11] Sprint's claims about SBC's "winback" percentages is, like its claims about long distance and DSL market share, irrelevant. The Commission has recognized that competition necessarily involves churn and carriers "winning back" their previous customers. In any event, CLEC shares in SBC's service area are increasing, not decreasing.

[12] WorldCom Comments at 2.

[13] In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards

the costs of structural separation requirements are not justified because non-structural safeguards adequately police behavior without the inefficiencies and costs of structural separation.[14] In Comsat, the Commission reiterated its findings that non-structural safeguards are more than sufficient to prevent anticompetitive conduct even if a carrier remains dominant in a particular market. As the Commission stated, "[w]e find that Comsat's continued dominance in the provision of switched voice, private line and occasional-use video services in non-competitive markets is not sufficient reason to continue structural separation because the costs would exceed the benefits."[15]

Further, the Commission clearly declined to extend the Act's default sunset in section 272 for BOC information services.[16] And in the *Reverse Directory Services* order, the Wireline Competition Bureau waived the CEI requirements for the BellSouth's and Verizon's provision of interLATA information services because it found, inter-alia, that granting the petitions will be more efficient than requiring the BOCs to use separate personnel, provisioning, and databases, and that the cost of compliance with the CEI requirements would outweigh any potential benefits of compliance.[17] Of course, the most recent and relevant precedent is *Verizon New York* where

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and Requirements, CC Docket Nos. 95-20 and 98-10, Further Notice of Proposed Rulemaking, at ¶¶ 47 and 56, 13 FCC Rcd 6040 (1998) (Computer III FNPRM).

[14] Computer III Further Remand Proceedings, CC 95-20 and 98-10, Report and Order, 14 FCC Rcd 4289, ¶7 (1999) (Computer III Report and Order). These findings were subsequently upheld by the courts. California v. FCC, 4 F.3d 1505 (9th Cir. 1993) (California II); California v. FCC, 39 F.3d 919 (9th Cir. 1994) (California III), cert. denied, 115 S. Ct. 1427 (1995).

[15] See COMSAT Corporation; Petition Pursuant to § 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, 13 FCC Rcd 14083, at ¶ 166 (1998).

[16] Request for Extension of Sunset Date of the Structural, Nondiscrimination and Other Behavioral Safeguards Governing Bell Operating Company Provision of In-Region, InterLATA Information Services, 15 FCC Rcd 3267, at ¶¶ 3-4 (2000). "…based on the record before us, we find that there are several safeguards that will limit adequately BOCs ability to discriminate against non-affiliated information service providers even after Section 272(f)(2) takes effect. For example, there are non-structural safeguards that will limit the BOCs ability to discriminate against non-affiliated information service providers."

[17] BellSouth Petition for Waiver of the Computer III Comparably Efficient Interconnection Requirements and Petition of the Verizon Telephone Companies for Waiver of Comparably Efficient Interconnection

the Commission ignored these same comments and allowed Verizon's sunset 272 obligations to sunset. Thus, contrary to WorldCom's arguments, Commission precedent actually supports the sunset of section 272 obligations in Texas.

SBC's competitors never wrestle with the issue of why structural separation is necessary, given the numerous nonstructural safeguards in the Act. WorldCom provides two arguments for the retention of structural separation, both of which are weak. It argues, first, that if SBC "…were permitted to provide both access and interLATA services on an integrated basis, it would be more difficult to detect and deter discrimination in the provision of access circuits."[18] This is pure speculation. As SBC has explained in its comments, for discrimination to have any effect, it would have to be evident to customers. And, if it were notable to customers, surely it would be noticed by the interexchange carriers, who in turn would make the regulators and enforcement authorities aware of the problem. Moreover, as this Commission has recognized, there are all kinds of safeguards in the Act to detect and deter discrimination. The nondiscrimination safeguards include sections 201, 202, 251, 272(e) [19] and the Commission's enforcement authority under section 271(d), which allows the Commission, among other

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Requirements to Provide Reverse Directory Assistance, CC Dockets 01-288 and 02-17, Memorandum Opinion and Order, 17 FCC Rcd 13881 (2002).

[18] WorldCom Comments at 4.

[19] Section 272(e)(1), which does not sunset, requires that a BOC fulfill any requests for local or exchange access services for unaffiliated entities in a period no longer than it fulfills such services for itself and its affiliates. As part of its compliance with section 272(e)(1), SBC committed in each of its 271 applications to track certain measures noted by the Commission in the Non Accounting Safeguards Order. See, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, App. C, 11 FCC Rcd 21905 (1996) (Non-Accounting Safeguards Order). WorldCom suggests that SBC's sunset be extended at least until the time that the Commission completes its NPRM on the 272(e) performance measures. For WorldCom to suggest that SBC's sunset should be postponed indefinitely – despite the fact that SBC has complied with the current Commission rules and received 271 approval based on its compliance with these rules – is ridiculous.

penalties, to suspend or revoke section 271 approval. In addition, the Commission has enforcement authority under sections 4(I), 503, and 206-209 of the Act.[20]

WorldCom's second argument is that the separate affiliate requirement is necessary because it "…avoids the need to allocate costs between local and interexchange operations..."[21] This is nonsense. As an initial matter, there should not be any need to allocate costs between local and long distance operations because SBC is under pure price cap regulation. Since price cap regulation severs the link between regulated costs and prices, it obviates the need for protection against cross subsidization, which is the purpose of cost allocation. However, as SBC has already stated in its Sunset NPRM comments, if the Commission were concerned about cross subsidization, it could impose additional less burdensome protection by requiring SBC to allocate its long distance costs as "non-regulated" pursuant to Part 64 of its rules. For WorldCom to advocate for the continuance of costly structural separation requirements on the grounds that it will "avoid" the need for less costly and burdensome procedures is ludicrous.

The Texas Attorney General's Office reiterates the Texas PUC's concern that without the separate section 272 affiliate, it cannot monitor SBC's obligation to provide access to its network.[22] The Texas Attorney General's Office and the Texas PUC misunderstand section 272. Section 272 governs BOC operations in the long distance market, not the local market. After sunset of section 272 requirements, state regulators retain the same authority over BOC network access that they do today.

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[20] The Texas Attorney General's Office also argues that without section 272 safeguards, regulators will have no adequate means of market oversight in the wholesale market. Texas Attorney General Comments at 4. As stated above, there are sufficient safeguards, including section 272(e), for oversight of SBC's conduct. Additionally, the Texas PUC oversees SBC's conduct in the local market through an exhaustive list of performance measures and its complaint process.

[21] WorldCom Comments at 4.

[22] Texas Attorney General Comments at 2.

Thus, given the highly competitive interexchange market, the low risk of discrimination, and the numerous safeguards in the Act, there is simply no justification for extension of section 272 structural separation requirements contrary to the intent of Congress.

D. Competitors' Specific Claims About SBC's Alleged Discriminatory Behavior Are Unsubstantiated and Irrelevant.

In an effort to substantiate their request for extension of SBC's section 272 regulations, SBC's competitors offer numerous ostensible gripes, including allegations regarding SBC's access to wholesale data, discriminatory interconnection provisions, and disputes about collocation tariff provisions.[23] In addition, Sprint argues that because SBC has had to make payments under its performance plan, the Section 272 requirements must be maintained, and it points to Commission enforcement or settlement actions regarding performance data, collocation, and shared transport services as evidence of need for structural separation.[24]

However, none of these complaints prove any discriminatory conduct by SBC, much less conduct that would be sufficiently egregious to justify going against a statutory presumption of sunset. For instance, Birch complains about various matters that are still "pending" and cannot point to any specific finding of discriminatory conduct against SBC. More important, none of the issues raised here relates to section 272 and delaying sunset would not affect these concerns. For example, one of the complaints raised by Birch about the provisioning of DS1 loops is a dispute about the interpretation of interconnection agreements. Section 272 does not govern interconnection performance; it governs BOC entry into the long distance and manufacturing markets. Similarly, it does not govern the retail/wholesale issues[25] or collocation tariff issues raised in other Birch complaints.

Although commenters try to use SBC's payments in Texas as grounds for requesting extension of section 272 safeguards, this does not demonstrate the need for structural

[23] Birch Comments at 7, 9 and 12

[24] Sprint Comments at 11 and 12.

[25] Birch's complaint on the erroneous provisioning of some Birch customers is simply a vehicle for Birch to request structural separation of SBC's retail and wholesale operations. Its effort to further bootstrap on this retail/wholesale structural separation petition to request extension of section 272 separations requirements is absurd.

separation. The only thing it demonstrates is that BOCs are subject to unprecedented and exhaustive regulation that includes hundreds of performance measures and micro manages all aspects of the BOCs' services. Indeed, far from suggesting a need for separate affiliate requirements, the performance measures are evidence that section 272 requirements are superfluous because almost everything the BOC does is monitored, tracked, and subject to payments.[26]

Sprint's use of Commission settlements or other enforcement actions to make a case of discrimination against SBC is equally frivolous and misleading. The enforcement actions relate to disputed legal issues like SBC's obligation to provide shared transport services, the Commission's ability to require sworn affidavits, interpretation of the Commission's collocation rules, or to data discrepancy issues with respect to some of the data SBC provided to the Commission as a result of the Ameritech Merger Order. These are wholly irrelevant to section 272 proceedings and provide no basis for extension of section 272 requirements.[27] Indeed, Sprint does not even purport to address how enforcement or settlement actions in other contexts affect the Commission's analysis under section 272 sunset. Thus, this Commission should reject the litany of complaints put forward by SBC's competitors as a red herring and see them for what they are: a lame attempt to prevent SBC from competing effectively in the market for local and long distance service.

III. CLEC'S, LIKE AT&T, IGNORE THE SUBSTANTIAL COSTS OF STRUCTURAL SEPARATION

As with AT&T, CLECs completely ignore the substantial costs of structural separation. Indeed, they do not even purport to address why the significant costs of structural separation do not outweigh its benefits. As SBC has explained in detail in its Comments here and in the *Sunset*

[26] Even if these issues were relevant, SBC's performance data shows that SBC's performance for Texas has improved over time, thus contradicting CLEC claims of discriminatory performance.

[27] Additionally, Sprint, like AT&T, attempts to mislead by stating that a settlement action is effectively an "admission" of discriminatory behavior by SBC.

NPRM proceeding – and as the Commission has recognized in other contexts - structural separation imposes various costs on BOCs including the costs of separate personnel, operations, networks, and computer systems. Additionally, the Commission's restrictions for separate Operating, Installation and Maintenance (OI&M) of switching and transmission facilities add a significant burden to the BOCs' and degrades their level of service.

Further, the nondiscrimination requirements of section 272(c) and the Commission's narrow interpretation of permissible joint marketing between the BOC and its section 272 affiliate result in the BOCs' competing with one hand tied behind their backs while their competitors compete freely – with no corresponding obligations. Given the extensive burden of these obligations there is absolutely no justification for the Commission to continue to impose these requirements on the BOCs.

IV. CONCLUSION

As Commissioner Martin stated last week at the Commission's Open Meeting:

> …those that want to extend that dominant carrier regulation or impose any other new regulatory requirement bear a significant burden in trying to justify how the benefits would outweigh the costs of any of those proposals.[28]

CLECs have not justified how the benefits of structural separation would outweigh its costs. On the contrary, they make the same local dominance arguments that the Commission has clearly rejected in *Verizon New York* and should reject in this case. Their lame attempts at proving discrimination should also be rejected because, despite their best efforts, they cannot point to any claims of discrimination that are either substantiated or even remotely related to section 272. On the other hand, they completely ignore the costs of structural safeguards and never wrestle with the issue of why the existing non-structural safeguards in the Act are insufficient to protect against possible discrimination. Their weak and self-serving arguments

[28] See, www.fcc.gov/realaudio/agendameetings.html (May 15, 2003).

should be rejected and SBC should be allowed to compete equally in Texas, as envisioned by Congress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Regina Ragucci, do hereby certify that on this 19th day of May 2003, Reply Comments of SBC Communications Inc. in WC Docket No. 02-112, were served first class mail - pre-paid postage to the parties attached.

/s/ Regina Ragucci
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